

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SAMUEL QUAKENBUSH
Claimant

VS.

DAY & ZIMMERMAN NPS, INC.
Respondent

AND

NEW HAMPSHIRE INSURANCE CO.
Insurance Carrier

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Docket No. 1,060,149

ORDER

Respondent and its insurance carrier (respondent) request review of the September 28, 2012, preliminary hearing Order entered by Administrative Law Judge Rebecca Sanders.

APPEARANCES

Judy A. Pope, of Leawood, Kansas, appeared for the claimant. John B. Rathmel, of Merriam, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record consists of the September 5, 2012, Preliminary Hearing transcript with the attached exhibits, and the documents of record filed with the Kansas Division of Workers Compensation (Division).

ISSUES

The Administrative Law Judge (ALJ) found claimant entitled to medical treatment and designated Dr. Sankoorikal as the authorized treating physician. The ALJ went on to order the medical bills contained in exhibits 6 and 7 to be paid as authorized medical treatment and temporary total disability compensation to be paid beginning April 3, 2012, until claimant is released to return to work and offered accommodated work with temporary

work restrictions, is found to be at maximum medical improvement or further Order of the Court. The ALJ authorized temporary total disability compensation (TTD) because she did not feel that claimant was terminated for cause. The ALJ ruled that respondent's hearsay evidence was not sufficient to contradict claimant's testimony under oath. The ALJ held that "Losing one's temper because an employee is not doing his job while very inappropriate does not constitute termination for cause."¹

The respondent requests review of the following:

- "1. Whether claimant met with personal injury on February 27, 2012.
2. Whether claimant's alleged accidental injury arose out of and in the course of employment.
3. Whether claimant's alleged personal injury by accident on February 27, 2012 is the prevailing factor causing the physical condition for which medical treatment is currently sought.
4. Whether claimant's alleged personal injury by accident on February 27, 2012 is the prevailing factor requiring medical restrictions imposed April 3, 2012.
5. Whether any evidence exists in the record to determine whether the medical restrictions imposed April 3, 2012 are temporary or permanent.
6. Whether any evidence exists in the record to determine whether claimant's current disability, if any, is total disability.
7. Whether the administrative law judge exceeded the jurisdiction of an administrative law judge by awarding temporary total disability based not on the statutory definition of K.S.A. 44-510c(b)(2) but on the finding, "Claimant's current restrictions would make it very difficult for claimant to find work as a laborer", when the only evidence of Claimant's physical capabilities in the record is that claimant was never restricted while working for respondent herein and claimant could have performed all physical tasks of his regular job with Respondent even under the restriction imposed at Claimant's request on April 3, 2012."²

Respondent argues that the ALJ's Order should be reversed because claimant has failed to prove by a preponderance of the evidence that he now suffers personal injury by accident arising out of and in the course of his employment "for which he can be compensated currently";³ has failed to meet his burden of proof under the prevailing factor

¹ ALJ Order (Sept. 28, 2011) at 2.

² Application for Review at 2 (filed October 12, 2012).

³ Respondent's Brief at 1 (filed Oct. 23, 2012).

cause requirement that his work accident resulted in his current need for medical treatment; and was terminated for cause.

Claimant contends the ALJ's Order should be affirmed and he should be granted medical treatment for his low back, right shoulder and right knee as well as TTD.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the appeal by respondent from the September 28, 2012, Order of the ALJ should be dismissed and the Order should remain in full force and effect.

Claimant began working for respondent as a laborer on February 23, 2012. This was a temporary assignment in which claimant was to clean out a shut-down reactor. Claimant testified the job was to last three to six months. On February 27, 2012, claimant was involved in an alleged work-related accident. He testified that he had been in a reactor for about ten hours and switched positions with another employee who was having problems. As he did so, dust came up and, as he turned and walked into an opening in some scaffolding, he fell seven to eight feet, striking his buttocks, back, shoulders and elbows. Claimant is claiming injury to his lower back, buttocks and right shoulder. He testified that he believes his right shoulder hurts more than his left because he was carrying a seven foot rod at the time of his fall and he thinks that he jerked his right shoulder as he held onto the rod to brace his fall. Claimant also complains that his right knee aches, catches and pops every once in a while. Claimant's description of the body parts injured from the fall included his shoulders, both elbows and his back. When claimant was questioned about whether he struck his knees at the time of the fall, he stated "Must have been injured in the fall".⁴ Claimant was working full duty without restrictions prior to the accident, and denies any preexisting problems.

Claimant immediately reported his accident to his supervisor, Jerry Potter, and to the safety officer. The rest of claimant's shift was spent filling out paperwork. Claimant returned to work the next day and worked his full shift. Shortly after the accident claimant was moved to a job titled "Fire Watch". Claimant worked that job the remainder of his employment with respondent. Claimant described this job as being "nothing physical".⁵

Claimant's employment was terminated on March 8, 2012, shortly after the accident. Respondent's records indicate claimant was terminated for assault and/or battery on a co-worker. Claimant indicated there was no physical battery only a verbal assault. He testified to having a difference of opinion with a co-worker over work performance and the

⁴ P.H. Trans. at 10.

⁵ *Id.* at 40.

conversation got heated, but did not get physical. Claimant denies spitting on or touching the co-worker. Claimant has not worked since he was terminated. He testified that no one will hire him the way he is.

Claimant is requesting treatment for his right knee so that he can find out what is wrong with it. He has had two injections in his back, but was denied a third injection. He reported pain and spasms that go down his right leg and keep him up at night. He also complains of pain in the front of his right shoulder at the rotator cuff, through the back of the shoulder blade.

Claimant had MRIs of the low back and right shoulder. The right shoulder MRI on August 1, 2012, revealed a torn rotator cuff, and the low back MRI revealed mild disc bulges at L4-L5 and L5-S1, mild neural foraminal stenosis at L4-L5, with mild bilateral neural foraminal stenosis at L5-S1.

Claimant testified that contrary to Dr. Gimple's notes, his shoulder pain had not resolved. He was not given any further treatment for the shoulder. He was assigned restrictions of no repetitive bending and no lifting over 30 pounds. Dr. Gimple noted that if work within those restrictions was not available then claimant should be off work. Claimant acknowledged that the Fire Watch job did not violate Dr. Gimple's restrictions.

Claimant was referred by respondent to Stormont-Vail WorkCare on March 1, 2012, where he was examined by Dale Garrett, M.D. The scaffold accident was described in the medical history. Claimant reported pain in his right shoulder, bilateral knees, low back and both elbows. He was diagnosed with a contusion of the right shoulder, low back and buttock and displayed bilateral knee pain. He was returned to regular duty without restriction. Claimant returned to Dr. Garrett on March 7, 2012, with pain in the right shoulder, low back and both knees. Claimant was diagnosed with a contusion to his back and buttock and bilateral knee pain. Claimant declined any restrictions and was again returned to work regular duty.

Claimant was next examined by Donald T. Mead, M.D., on March 12, 2012, as a referral by respondent. The history of the fall was consistent with prior medical reports. Claimant reported slight tenderness in his shoulders, elbows, low back and knees. He was diagnosed with bilateral knee strain, a sprain of the lumbar spine and a right elbow contusion. Claimant's main complaint was to the low back. However, the medical notes indicated the pain had an onset of less than one day before the March 12, 2012, examination. Claimant described improvement in his left elbow and shoulders. His right elbow was still tender and he had occasional pain in his knees when driving. Claimant displayed tenderness over the spine at L3-L5.

Claimant was referred for physical therapy with St. Francis Sport Medicine beginning on March 22, 2012. Claimant displayed pain in his bilateral knees, lumbar spine, right shoulder and right elbow. Through several weeks of physical therapy claimant continued

to display low back pain, aching in his bilateral knees and pain into his right shoulder. The right elbow pain appeared to improve with physical therapy. By April 17, 2012, claimant was reporting ongoing pain in his low back and right shoulder. The right elbow pain was intermittent. Claimant underwent an MRI of the lumbar spine on April 16, 2012. The MRI displayed mild disc bulges and foraminal stenosis at L4-5 and L5-S1. By April 24, 2012, claimant was reporting good pain relief in the right shoulder area but ongoing low back and right elbow pain.

Claimant was examined at the Tallgrass Orthopedic and Sports Medicine office, under the care of board certified orthopedic surgeon, Kenneth Gimple, M.D., on May 23, 2012. A white pain drawing from that date displayed pain in claimant's right shoulder and low back, but contains no indication of right elbow or knee pain. Additionally, while the admissions form discusses a possible examination of the knees, the medical notes do not indicate an examination of the knees.

On August 1, 2012, claimant was again examined at Tallgrass by Dr. Gimple. Claimant's low back pain was listed as chronic. However, his right shoulder complaints were described as "Resolved".⁶ No further treatment was recommended for the right shoulder.

There is no medical report in this record which discusses whether claimant's accident on February 27, 2012, is the prevailing factor causing the need for the medical treatment claimant is currently seeking. Claimant was asked whether he attributed his low back injury to the accident on February 27, 2012. He said "Yes".⁷

PRINCIPLES OF LAW AND ANALYSIS

With regard to issues No. 1 and No. 2 above listed, respondent, at the preliminary hearing, admitted that claimant suffered a work related accidental injury on February 27, 2012.⁸ Respondent further admitted that medical treatment was immediately provided for the injuries suffered from that fall. There was no request by respondent to withdraw or change any of the preliminary hearing stipulations. Issues No. 1 and No. 2 are determined in claimant's favor, pursuant to the preliminary hearing stipulations of the parties. However, respondent stated at the preliminary hearing that they continue to dispute claimant's accident of February 27, 2012, is the prevailing factor leading to claimant's current request for medical treatment. Respondent contends claimant suffers from degenerative disk disease in his low back, and the acute effects of the accident to claimant's shoulder and knee have been successfully treated. Respondent argues

⁶ *Id.*, Cl. Ex. 4 at 10 (Dr. Gimple's Aug. 1, 2012 report at 4).

⁷ *Id.* at 15.

⁸ *Id.* at 4-5.

claimant's current need for medical treatment does not stem from the effects of the accident.

K.S.A. 2011 Supp 44-508(f)(2)(B) states:

(B) An injury by accident shall be deemed to arise out of employment only if:

- (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
- (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2011 Supp 44-508(f)(3)(A) states:

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

- (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
- (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
- (iii) accident or injury which arose out of a risk personal to the worker; or
- (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

Claimant alleges injuries to several parts of his body. The ALJ's Preliminary Hearing Order does not identify the body parts needing medical treatment, only that medical treatment is authorized with Dr. Sankoorikal. As noted above, respondent has admitted that claimant suffered the accidental injury on February 27, 2012. The current dispute deals with claimant's request for ongoing medical treatment to the body parts identified as originally injured. The contested issues involve the need for medical treatment, not whether claimant was originally injured.

K.S.A. 2011 Supp. 44-534a(a)(1) states:

- (a) (1) After an application for a hearing has been filed pursuant to K.S.A. 44-534, and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total or temporary partial disability compensation. At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the

requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. Copies of medical reports or other evidence which the party intends to produce as exhibits supporting the change of benefits shall be included with the application. The director shall assign the application to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?⁹

Whether the ALJ should, in a given set of circumstances, authorize temporary total disability compensation or medical compensation is not a question that goes to the jurisdiction of the ALJ. It also exceeds the jurisdiction of the Board on an appeal from a preliminary hearing order. Here, this Board Member finds that the order allowing ongoing medical treatment and TTD is within the jurisdiction of the ALJ and will not be considered by the Board at this time. The Preliminary Hearing Order of the ALJ remains in full force and effect and the appeal by respondent is dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

⁹ K.S.A. 2011 Supp. 44-534a(a)(2).

¹⁰ K.S.A. 2011 Supp. 44-534a.

CONCLUSIONS

The appeal of respondent from the Preliminary Hearing Order of the ALJ is dismissed and the Order remains in full force and effect. The issues raised by respondent are not ones over which the Board takes jurisdiction on an appeal from a preliminary hearing order.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the appeal by respondent from the Order of Administrative Law Judge Rebecca Sanders dated September 28, 2012, is dismissed and the Order remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of January, 2013.

HONORABLE GARY M. KORTE
BOARD MEMBER

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Rebecca Sanders, Administrative Law Judge